2010 WL 9934174 (Hawai'i Cir.Ct.) (Trial Motion, Memorandum and Affidavit)
Circuit Court of Hawai'i.
Honolulu County

Alden James ARQUETTE, Plaintiff,
v.
State of Hawaii; Stephen H. Levins; Michael J.S. Moriyama, and John Does 1-25, Defendants.

No. 081011801.
February 22, 2010.

Plaintiff's Memorandum in Opposition to Defendants State of Hawaii, Stephen H. Levins, and Michael J.S. Moriyama's, individually and in their official capacities, Motion for Summary Judgment; Affidavit of Keith A. Matsuoka; Exhibits A - X; Certificate of Service

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Judge: Karl K Sakamoto.

HEARING:

Date: March 2, 2010

Time: 9:30 a.m.

(Trial: August 9, 2010)

I. *BACKGROUND FACTS*

This case arises from the Office of Consumer Protection's (hereinafter "OCP") prosecution of Alden James Arquette (hereinafter "Plaintiff) in *State of Hawaii v. Rodwin L. Wong, et al.,* Civil No. 04-1-1317-07 for alleged violations of trade regulations based on sales of deferred annuity contracts to **elderly** consumers. Exhibit 1 attached to Defendants State of Hawaii, Stephen H. Levins, and Michael J.S. Moriyama's, individually and in their official capacities, Motion for Summary Judgment (hereinafter "Civil No. 04-1-1317-07"). [1]

In the Complaint filed on July 19, 2004 Defendant Moriyama, on behalf of the OCP charged Plaintiff with the following violations:
Count I: That Plaintiff misrepresented himself as a "paralegal" working with Defendant Rodwin L. Wong there to discuss estate planning services to gain access to financial information/assets of *unnamed* **elderly** consumers which was used by Plaintiff for the purpose of selling them deferred annuities with pay-outs scheduled to begin 10 to 20 years later and which included substantial early withdrawal fees, in violation of HRS §§ 480-2, 481A-3, 480-13.5 and/or 487-14(f).

Count II: That Plaintiff misrepresented himself as a "providing **elder** and/or estate planning services" through Defendant Wong's law practice to gain access to financial information/assets of *unnamed* **elderly** consumers which was used by Plaintiff for the

purpose of selling them deferred annuities with pay-outs scheduled to begin 10 to 20 years later and which included substantial early withdrawal fees, in violation of HRS §§ 480-2, 481A-3, 480-13.5 and/or 487-14(f).

Count V: That Plaintiff engaged in a scheme to have *unnamed* **elderly** consumers replace, cancel or terminate existing life insurance or annuity contracts to purchase deferred annuities without providing consumers with information required by Hawaii law in violation of HRS §§ 480-2, 481A-3, 480-13.5 and/or 487-14(1).

Count VIII: That Plaintiff engaged in a scheme to have *unnamed* **elderly** consumers sell "securities" to purchase deferred annuities without analyzing and evaluating the suitability of selling such "securities" and or purchasing such "deferred annuities" in violation of HRS §§ 480-2, 481A-3, 480-13.5 and/or 487-14(f).

Count IX: That Plaintiff engaged in a scheme to have *unnamed* **elderly** consumers sell "securities" to purchase deferred annuities without being registered as a securities salesperson in violation of HRS §§ 485-14 and 487-13.

Count XII: That Plaintiff engaged in a scheme to have *unnamed* **elderly** consumers sell "securities" to purchase deferred annuities without being a licensed investment advisor in violation of HRS §§ 485-14 and 487-13.

Count XIII: That Plaintiff used high pressure sales tactics against *unnamed* **elderly** consumers in violation of HRS §§ 480-2, 481A-3, 480-13.5 and/or 487-14(f).

Count XIV: That Plaintiff engaged in a scheme to sell existing assets of consumers and sell them deferred annuities targeted at *unnamed* **elders** in violation of HRS §§ 480-2, 481A-3, 480-13.5 and/or 487-14(f).

See Exhibit 1 attached to Defendants' Motion.

While the initial Complaint did not identify any particular "**elderly** consumer" affected by the violations alleged, on October 13, 2004 Defendant Moriyama moved, ex *parte*, for a preliminary injunction against Plaintiff based on his sale of annuities to Limuel and Hazel Cherry [2] (hereinafter "the Cherrys"). See Exhibit A attached to Affidavit of Keith A. Matsuoka.

On April 12, 2005 Defendant Moriyama identified Joseph and Lillian Arruda (hereinafter "the Arrudas"), James Gamache (hereinafter "Gamache"), Solomon and Esther Paakaula (hereinafter "the Paakaulas"), Melvin and Joan Pacheco (hereinafter "the Pachecos") as consumers whose transactions formed the bases his initial charges against Plaintiff. See Exhibit B attached to Affidavit of Keith A. Matsuoka.

On December 21, 2005 the trial court granted summary judgment to Plaintiff on all charges alleged as to the Cherrys. See Exhibit C attached to Affidavit of Keith A. Matsuoka.

On December 22, 2005 the trial court granted, in part, and denied, in part, summary judgment in favor of Plaintiff as to the remaining "consumers" (i.e., the Axrudas, Paakaulas, Pachecos and Gamache). See Exhibit D attached to Affidavit of Keith A. Matsuoka.

On May 16, 2006 the trial court denied Defendant Moriyama's motion to continue trial (see Exhibit E attached to Affidavit of Keith A. Matsuoka), and ordered a severance of the trial as to Plaintiff (see Exhibit F attached to Affidavit of Keith A. Matsuoka).

On June 26, 2006 Defendant Moriyama stipulated to dismiss the balance of all remaining claims against Plaintiff. See Exhibit G attached to Affidavit of Keith A. Matsuoka.

The instant action was filed on January 17, 2008 alleging claims against Defendants for malicious prosecution, negligent investigation, negligent failure to train and/or supervise, and punitive damages.

Defendants have now moved for summary judgment in their favor on various claims alleged in this action (hereinafter "Defendants' Motion").

II. *ARGUMENT*

For the reasons set forth below Plaintiff submits that Defendants' motion should be denied because: (1) there is substantial evidence showing that Defendant Moriyama initiated and maintained the charges against Plaintiff in Civil No. 04-1-1317-07 without probable cause; (2) there is substantial evidence showing that he did so with the requisite malice; (3) the OCP owed a statutory duty of care to Plaintiff in the exercise of its statutory authority, and; (4) Defendant Levins is subject to liability in his official capacity for the negligence of Defendant Moriyama.

A. *Summary Judgment Standard*

Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. A fact is material if proof of that fact would have the effect of establishing or refuting one of the essential elements of a cause of action or defense asserted by the parties. The evidence must be viewed in the light most favorable to the non-moving party. In other words, the court must view all of the evidence and the inferences drawn therefrom in the light most favorable to the party opposing the motion, *Kau v. City and County of Honolulu.* 104 Haw. 468, 473-474 (2004).

B There is substantial evidence showing that Defendant Moriyama *initiated*[3] *the action against Plaintiff without probable cause*

In *Young v. Allstate Insurance Co.*, 119 Haw. 403 (2008) the Supreme Court described the tort of malicious prosecution as follows:

The tort of malicious prosecution protects the interest in freedom from unjustifiable litigation. *Prosser and Keeton onTorts*, §119, at 870. The tort serves to compensate a party sued in a malicious and meritless legal action for his or her financial costs, as well as psychic damage from the shock of the unfounded allegations in the pleadings and the loss of his reputation in the community as a result of the filing and notoriety of the base allegations in the pleadings which are public records. *Stanley v. Superior Court*, 130 Cal.App.3d 460, 468, 181 Cal. Rptr. 878, 882 (1982)(citing *Bertero v. Nat'l Gen. Corp.*, 13 Cal.3d 43, 50-51, 529 P.2d 608, 614, 181 Cal.Rptr. 184, 190 (1974); *see also, Hewitt v. Rice*, 119 P,3d 541, 544 (Colo.Ct.App. 2004)("the purpose of an action for malicious prosecution is to compensate a person sued in a malicious and baseless legal action for attorney fees, costs, psychic damage, and loss of reputation.")). As the party "haled into court" in a meritless and malicious suit, "the plaintiff's interests have been invaded, the plaintiff's reputation has suffered, and the plaintiff has been put to the expense of defense." *Prosser and Keelon on Torts*, § 119, at 871. Specifically, "wrongful civil suits can destroy a livelihood, devastate a business, or chill debate on public issues. Dan B. Dobbs, *The Law of Torts*, § 436, at 1228 (2001). *see also, Bertero*, 13 Cal.3d at 50-51, 529 P.2d at 614, 118 Cal.Rptr. At 190 ("The individual is harmed because he is compelled to defend against a fabricated claim which not only subjects him to the panoply of psychological pressures most civil defendants suffer, but also the additional stress of attempting to resist a suit commenced out of spite or ill will, often magnified by slanderous allegations in the pleadings."); *White v. Prank*, 855 f.2d 956, 960 n.3 (2 nd Cir. 1988)(noting that the tort of malicious prosecution "provides redress, though only under tightly guarded circumstances, from unjustifiable litigation in order to protect the plaintiff's financial interests and interest in bodily freedom, as well as his reputation." (citing Fowler V. Harper, *Malicious Prosecution, False Imprisonment and Defamation*, 15 Tex.L.Rev. 157, 168-70 (1937))); *cf. Ellis v. Harland Bartholomew and Assocs.*, 1 Haw.App. 420, 428, 620 P.2d 744, 750 (1980) (observing, in the context of the dismissal of a civil proceeding, that "somewhere along the

line, the rights of the defendant to be free from costly and harassing litigation must be considered. So too must the time and energies of our courts and the rights of would be litigants awaiting their turn to have other matters resolvved." (quoting *Von Poppenheim v. Portland Boxing and Wrestling Comm'n*, 422 F.2d 1047, 1054 (9th Cir. 1971))).

Id., at 418 (2008).

The tort of malicious prosecution has three essential elements: (1) that the prior proceedings were terminated in the plaintiff's favor, (2) that the prior proceedings were initiated without probable cause, and (3) that the prior proceedings were initiated with malice. *Brodie v. Hawaii Automotive Retail Gasoline Dealers Ass'n*, 2 Haw. App.316, 318 (1981). [4]

Probable cause for filing a lawsuit exists where a person reasonably believes in the existence of facts upon which the claim is based, and correctly or reasonably believes that under those facts the claim may be valid under the applicable law. *Brodie v. Hawaii Automotive Retail Gasoline Dealers Ass'n*, 2 Haw. App.316, 3 18 (1981), citing Restatement (Second), Torts §675 (1977): *Matsuura v. E.I. Du Pont*, 102 Haw. 687, 701 (2003)("As a general principle ... the question of whether one has acted reasonably under the circumstances is for the trier of fact to determine.").

Defendants herein contend there was a "reasonable basis" for initiating the lawsuit against Plaintiff. See, Memorandum in Support of Motion, attached to Defendants' Motion, at pp. 6-9.

Defendants' contention is not supported by the evidence presented. When stripped of its' inadmissible hearsay, Defendant Moriyama's declaration shows that his charges against Plaintiff were based on the OCP's investigation of a sample of consumers drawn from information provided to him by the Securities Enforcement Branch, DCCA (i.e., "SEB"). Declaration of Michael J.S. Moriyama, attached to Defendants' Motion, at ¶¶ 10-17.

The SEB list from which he drew his sample, [5] however, only shows that Dan Fox and Sidney Monschein were connected with certain securities related to certain individuals in the sample upon which Defendant Moriyama's investigation was based. [6] Thus the only reasonable inference that can be drawn is that Defendant Moriyama initiated the charges against Plaintiff based on information that showed that Plaintiff was not involved with any of the transactions which formed the bases for the charges alleged against him. Moreover, the records in Civil No. 04-1-1317-07 confirm that Defendant Moriyama had no evidence to support his charges against Plaintiff at any time. *Myers v. Cohen*, 67 Haw 389, at 391 (1984)(holding that on a motion for summary judgment in a malicious prosecution case a court may take judicial notice of the files in the preceding state civil case, and a party is bound by in-court statements in the preceding judicial proceedings).

Since the Complaint did not identify any consumers who were victimized by the alleged acts and/or omissions charged in Civil No. 04-1-1317-07, in December, 2004, Plaintiff requested that Defendant Moriyama produce and/or identify the evidence upon which the charges alleged against Plaintiff were based. On January 27, 2005, *five months after he had charged Plaintiff*, Defendant Moriyama objected on the ground that discovery had not been completed. See Exhibit H attached to Affidavit of Keith A. Matsuoka. As a result, Plaintiff was required to move to compel answers to interrogatories on February 16, 2005 which, in relevant part, was granted by the trial court on March 18, 2005. See Exhibits I & J attached to Affidavit of Keith A. Matsuoka.

It was only then that Defendant Moriyama identified *the Arrudas, Gamache, the Paakaulas, the Pachecos,* and the Cherrys [7] as consumers whose contacts with Plaintiff formed the bases for the charges (see Exhibit B attached to Affidavit of Keith A. Matsuoka); however, Defendant Moriyama was never able to produce any evidence to dispute Plaintiff's assertion that he had worked for attorney Rodwin Wong as a paralegal since 1999, that he had never sold, attempted to sell or even discussed insurance products/annuities or securities with *the Arrudas, Gamache, the Paakaulas, or the Pachecos,* and that no complaints ever had been filed against him for violating insurance or securities regulations. Exhibit K attached to Affidavit of Keith A. Matsuoka.

Moreover, the record in Civil No. 04-1-1317-07 also shows *the Paakaulas* and *the Pachecos* were not interested in being involved in Defendant Moriyama's action. See Exhibit L attached to Affidavit of Keith A. Matsuoka,

In apparent recognition that he did not have any evidence to support his charges on March 24, 2006, Defendant Moriyama sought to modify a protective order previously entered by the trial court so he could obtain discovery of confidential financial information about Plaintiff's clients without having to notify and obtain the consent of the individuals whose information would be disclosed (See Exhibit M attached to Affidavit of Keith A. Matsuoka) which was denied (See Exhibit N attached to Affidavit of Keith A. Matsuoka), and on April 11, 2006 Defendant Moriyama moved to continue the trial (See Exhibit O attached to Affidavit of Keith A. Matsuoka).

At a hearing on April 13, 2006, the following discussion took place as to Plaintiff's Motion to Continue Trial:
THE COURT: And what discovery's been done and what hasn't been done?

MR. MATSUOKA: He hasn't identified any discovery that he's going to do. He just keeps saying - I mean all of his responses to everything has been discovery's ongoing. But we haven't -

MR. MORIYAMA: All our discovery requests are out. But everybody's saying the protective order says we don't turn over anything until we get consent from our clients. My discovery has been sitting out there since soon after the complaint was filed.

THE COURT: Well, I guess the basic problem I have is you brought the case. And it usually - you brought the case. You have investigators. Typically these cases start with consumer complaints. So you should be ready to go.

MR. MORIYAMA: Right. I think then, Your Honor, in this case it's a little different, right? Because we have consumer complaints. We've investigated those complaints. But there are indications that there are - they were very successful in what they did. And so there were a lot of people that they made sales to. We don't know who those people are. The defendants know who those people are. And right now under the protective order they're not disclosing, they're not giving us information on those people.

And so I think if we modify the protective order then we'll go forth with our - enforcing our discovery requests, so we can get at the information.

THE COURT: Well, I've denied the motion to modify the protective order. So now what are you going to do?

MR. MORIYAMA: Probably file a motion to - for an order ordering the defendants to get consent from their clients to release the information.

THE COURT: And what if 1 deny that?

MR. MORIYAMA: Then we're going to go forth with the case that we have right now, which I don't think is quite right. But we'll do it.

Exhibit P attached to Affidavit of Keith A. Matsuoka.

By order entered on May 16, 2005, the trial court denied Defendant Moriyama's motion to continue trial and severed the trial as to Plaintiff (See Exhibits E & F, attached to Affidavit of Keith A. Matsuoka), and on June 26, 2006 Defendant Moriyama agreed to dismiss all remaining claims as to Plaintiff (See Exhibit G attached to Affidavit of Keith A. Matsuoka). Cf., *Brodie v. Hawaii Automotive Retail Gasoline Dealers Ass'n,* 2 Haw. App.316, 321 (1981)(noting that a voluntary dismissal may give rise to an inference that there was a lack of probable cause).

Accordingly, it should be determined that Defendant Moriyama did not have probable cause for initiating the charges against Plaintiff in Civil No. Civil No. 04-1 -1317-07.

B. ***There is substantial evidence showing that Defendant Moriyama acted with actionable malice***

Defendants contend that they are entitled to summary judgment on Plaintiffs claim for malicious prosecution because "there is absolutely no evidence that the prior proceeding was initiated with malice," and that they are entitled to summary judgment under the doctrine of qualified immunity because malice must be proved to overcome Michael Moriyama's and Stephen Levin's qualified immunity. See, Memorandum in Support of Motion, attached to Defendants' Motion, at pp. 6 & 9. [8]

Substantial evidence on the record in Civil No. 04-1-1317-07 shows that Defendant Moriyama acted with malice sufficient to bar summary judgment in his favor as to Plaintiff's claim for malicious prosecution and Defendants' claim for qualified immunity.

For the purposes of a claim for malicious prosecution the definition of "malice" is identical to the definition applicable to a claim for qualified immunity, i.e., "without just cause or excuse or in reckless disregard for the law or of a person's legal rights."

"To sustain a claim for malicious prosecution, a plaintiff must show that the defendant initiated the prior lawsuit with malice, which this court has defined as 'the intent, without justification or excuse, to commit a wrongful act,' 'reckless disregard for the law or of a person's legal rights,' and 'ill will; wickedness of heart.' " *Young v. Allstate Insurance Co.*, 119 Haw. 403. 419 (2008); *Awakuni v. Awana.* 115 Haw. 126, 141 (2007).

A nonjudicial governmental officer is not entitled to qualified immunity where such officer is motivated by malice or improper purpose. *Towse v. State of Hawaii.* 64 Haw. 624, 632-33 (1982). In analyzing Defendants' claim for qualified immunity in the instant case the court applies the definition of malicious/malice as "without just cause or excuse or in reckless disregard for the law or of a person's legal rights." See, *Haldeman v. Golden,* 2008 WL 1744804, citing *Awakuni v. Awana,* 165 Haw. 126, 140-141 (2007).

Although in order to defeat Defendant's claim for qualified immunity Plaintiff bears the burden at trial of proving with clear and convincing evidence that Defendant Moriyama was motivated by malice. [9]

[this] does not denigrate the role of the jury. It by no means authorizes trial on affidavits. Credibility determinations, the weighing of evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict. The evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor. Neither do we suggest that the trial court should act other than with caution in granting summary judgment or that the trial court may not deny summary judgment in a case where there is reason to believe that the better course would be to proceed to a full trial.

Anderson v. Liberty Lobby. Inc., 477 U.S. 242, 255, 106 S.Ct. 2505, , 91 L.Ed.2d 202, 216 (1986)(citations omitted).

Malice is seldom the subject of confession by the wrongdoer; accordingly it usually must be proven by inferences from other evidence, and it is well settled law that malice may be inferred from alack of probable cause. See, *Stewart v. Sonneborn,* 98 U.S. 187,25 L.Ed.2d 116 (1878)(malice may be inferred by a jury from a want of probable cause); *Gaspar v. Nahele,* 14 Haw. 574, 575 (1903)("The rule is settled that malice may be inferred by the jury from the want of probable cause."); 52 Am.Jur.2d, *Malicious Prosecution* §§49, 80 (2000); 54 C.J.S., *Malicious Prosecution or Wrongful Litigation* §§19, 39 (2005).

The record in Civil No. 04-1-1317-07 clearly establishes that when the action was initiated Defendant Moriyama had absolutely no information showing that Plaintiff was involved in or connected with any of the annuities or securities which formed the

bases for any of the charges alleged against him, *supra.* Thus, a jury surely could infer that Defendant Moriyama initiated the prosecution of Plaintiff without justification and in reckless disregard of Plaintiff's legal right to be free from unjustifiable and/or meatless legal action.

In addition, in Civil No. 04-1-1317-07 Defendant Moriyama alleged that Plaintiff had used his title as a paralegal working for attorney Rodwin Wong, providing estate planning services to **elderly** consumers, for the purpose of obtaining access to financial information from unnamed **elderly** consumers in order to sell them inappropriate deferred annuities and selling the consumers' securities to purchase annuities they did not need.

Although Defendant Moriyama initiated the prosecution of Plaintiff in Civil No. 04-1-1317-07 based on annuities allegedly purchased by *the Arrudas. Gamache, the Paakaulas, the Pachecos* (See Exhibit B attached to Affidavit of Keith A. Matsuoka), after learning that Plaintiff had never sold, attempted to sell or even discussed insurance products, annuities, or securities with *the Arrudas, Gamache, the Paakaulas, or the Pachecos.* (See Exhibit K attached to Affidavit of Keith A. Matsuoka), and that the *Paakaulas* and *the Pachecos* had indicated that they were not interested in being involved in Civil No. 04-1-1317-07 (See Exhibit L attached to Affidavit of Keith A. Matsuoka), without justification, and in reckless disregard of Plaintiff's legal rights, Defendant Moriyama nevertheless maintained his prosecution of Plaintiff by attempting to improperly obtain confidential financial information from other defendants (See Exhibit M attached to Affidavit of Keith A. Matsuoka), and by attempting to continue Plaintiff's trial on the unwarranted charges alleged against him (Exhibit O attached to Affidavit of Keith A, Matsuoka).

The record in Civil No. 04-1-1317-07 also shows that under the circumstances Defendant Moriyama's attempt to maintain his prosecution of Plaintiff based on transactions involving the Cherrys also was without justification and in reckless disregard of Plaintiff's legal rights.

On October 13, 2004 Defendant Moriyama, ex parte, obtained a temporary restraining order and moved for preliminary injunction on the same grounds for a 92 year old widow, Hazel Cherry, barring Plaintiff from engaging in any transactions on her behalf and/or from possessing or controlling any assets or property owned by her. At the time, Defendant Moriyama was aware that Plaintiff's sale of annuities [10] to Ms. Cherry had preceded and accordingly was *not the result of* Plaintiff having obtained financial information from Ms. Cherry through his work as a paralegal for attorney Rodwin Wong. As part of the Temporary Restraining Order Defendant Moriyama had the Office of the Public Guardian appointed as Ms. Cherry's guardian of the person, and Maximum Legal Services as the guardian of her property. See Exhibit A attached to Affidavit of Keith A. Matsuoka.

Defendant then assisted (1) the Attorney General in charging Plaintiff with “financial and economic exploitation” of Hazel Cherry, i.e., Civil No. 04-1-1985 on October 28, 2004 (See Exhibit Q attached to Affidavit of Keith A. Matsuoka), and (2) Adult Protective Services in initiating proceedings in the Family Court to protect Ms. Cherry's financial assets from Plaintiff in FC-G No. 04-1-0279 filed on September 22, 2004, and FC-AA No. 04-1-0008 filed on November 9, 2004. See Exhibit R attached to Affidavit of Keith A. Matsuoka; See also, Affidavit of Keith A. Matsuoka, at ¶¶ 29-30 (noting that Defendant Moriyama appeared to be over-involved in the investigations and proceedings conducted by other agencies in Civil No. 04-1-1985, FC-G No. 04-1-0279, and FC-AA No. 04-1-0008, and was a major source of misinformation which formed the basis for their claims).

On October 20, 2004 Hazel Cherry objected to the order appointing guardians for her noting, *inter alia*, that: (1) she was not a named party in Civil No. 04-1-1317-07; (2) she was distraught after her husband, Limuel Cherry, had passed away suddenly at the Straub Clinic and Hospital on August 2, 2004, and at the insistence of Straub personnel she agreed to reside at a care facility; and (3) on September 20 2004 Dr. Baron Wong opined that she still had decisional capacity for medical, financial and legal issues. See Exhibit S attached to Affidavit of Keith A. Matsuoka. [11]

On October 25, 2004 Plaintiff had attempted to obtain Hazel Cherry's notarized signature on a declaration she had previously signed stating that she had never made a complaint against Plaintiff and that the OCP had never contacted her with regard to any complaint about Plaintiff. See Exhibit T attached to Affidavit of Keith A. Matsuoka. Without ever investigating the nature of Plaintiff's contact with Hazel Cherry, on November 23, 2004 Defendant Moriyama charged Plaintiff for violating the

Temporary Restraining Order issued on October 13, 2004 (see Exhibit U attached to Affidavit of Keith A, Matsuoka) which the trial judge denied on December 29, 2004 (see Exhibit V attached to Affidavit of Keith A. Matsuoka).

On September 30, 2005 the Attorney General agreed to dismiss with prejudice its charge against Plaintiff of "financial and economic exploitation" of Hazel Cherry in Civil No. 04-1-1985-10. See Exhibit W attached to Affidavit of Keith A. Matsuoka.

On November 2, 2005 the Department of Human Services agreed to dismiss with prejudice its claims against Plaintiff in FC-AA No. 04-1-0008 with the expressed admission that "[t]he acts alleged by Petitioner in support of the Petition for Protection filed herein on November 9, 2004 as having been committed by Respondent ALDEN JAMES ARQUETTE against HAZEL K. CHERRY do not constitute "**abuse**" and "financial exploitation" as those terms are defined by H.R.S. §346-222." See Exhibit X attached to Affidavit of Keith A. Matsuoka.

Even when faced with the above, Defendant Moriyama maintained his prosecution of Plaintiff as to the Cherrys, necessitating Plaintiff to move for summary judgment on November 17, 2005, which the trial court granted on December 21, 2005. See Exhibit C attached to Affidavit of Keith A. Matsuoka; See also, Affidavit of Keith A. Matsuoka, at ¶¶ 26 - 3 1 (noting that throughout the proceedings Defendant Moriyama appeared to display a very personal animus against Mr. Arquette; that he disregarded or knowingly failed to assess the applicable law in order to persecute Mr. Arquette in violation of his legal rights, and; that his conduct needlessly increased the cost of litigation).

Accordingly the Court should determine that there is substantial evidence establishing a genuine issue as to whether Defendant Moriyama initiated and maintained the charges against Plaintiff "without just cause or excuse or in reckless disregard for the law or of a person's legal rights."

C. Haw. Rev. Stat. § 487-1 imposes a statutory duty of care on Defendants to exercise their statutory authority with due regard to Plaintiff's legitimate business activities

Plaintiff submits that Haw. Rev. Stat. §487-1 imposes a duty of care on Defendants to exercise their statutory duties with due regard to Plaintiff's legitimate business activities. See, *Lee v. Corregadore.* 83 Haw. 154, 172 (1996)(Duty in a negligence action may be defined by common law or by statute).

HRS §487-1, in relevant part, provides the following:

Legislative intent

> The public health, welfare and interest require a strong and effective consumer protection program *to protect the interests of* both the consumer public and *the legitimate business person.*

In construing a statute the court's primary obligation is to ascertain and give effect to the intention of the legislature, which is to be obtained primarily from the language contained in the statute itself. When construing a statute, the fundamental starting point is the language of the statute itself and where the statutory language is plain and unambiguous, the court's sole duty is to give effect to its plain and obvious meaning. Departure from the literal construction of a statute is justified only if such a construction yields an absurd and unjust result obviously inconsistent with the purposes and policies of the statute. *Leslie v. Board of Appeals,* 109 Haw. 384, 393 (2006).

"If a statute 'contains no express provision that its violation shall result in tort liability, and no implication to that effect, the court may, and in certain types of cases customarily will, adopt the requirements of the enactment as the standard of conduct necessary to avoid liability for negligence.' Restatment (Second) of Torts § 285 comment c (1965). Courts may adopt the requirements of

a statute as the standard of care when the purpose of the statute is to 'protect a class of persons which includes the one whose interest in invaded.' Restatement (Second) of Torts § 268(a) (1965)." *Lee v. Corregadore,* 83 Haw. 154, 173 (1996).

Plaintiff submits that the legislature intended that OCP exercise its statutory duties with due regard to an individual's legitimate business activities, and Plaintiff was clearly within the class of persons the statute is intended to protect.

In this case substantial evidence on the record shows that Defendant Moriyama deliberately and persistently ignored Plaintiff's clear, unequivocal, and valid defense to the complaint, and that all of his contacts with the consumers in the prior action were legitimate business activities. Thus, a jury should be allowed to determine Defendant Moriyama's liability for negligent investigation. See, *Tseu v. Jeyte,* 88 Haw. 85, 90-92 (1998)(holding that ignoring a clear and valid defense to a complaint can render the filing of a complaint actionable negligence).

D. ***Defendant Levins is subject to liability under the doctrine of respondeat superior for Defendant Moriyama's negligence***

Defendant Levins may be held liable for the negligent acts of Defendant Moriyama in his official capacity under the theory of respondeat superior. To recover under the theory of respondeat superior Plaintiff must prove: (1) a negligent act of Defendant Moriyama, i.e., breach of a legal duty that is the legal cause of Plaintiff's injury, and (2) that the negligent act was within Defendant Moriyama's scope of employment. The analysis of negligence under the theory of respondeat superior focuses on the actions of Defendant Moriyama, without consideration of the acts of Defendant Levins, and Plaintiff need not show any act or fault on the part of Defendant Levins. *Wong-Leong v. Hawaiian Indep. Refinery. Inc.,* 76 Haw. 433, 438-439 (1994); *State of Hawaii v. Hoshijo.* 102 Haw. 307 (2003).

Here Plaintiff alleges that Defendant Moriyama is liable for negligence in charging Plaintiff without due regard for his legitimate business activities, and it is undisputed that at all times relevant herein Defendant Moriyama was acting within the scope of his employment. See, Declaration of Michael J.S. Moriyama, attached to Motion, at ¶ 8; Declaration of Stephen H. Levins, attached to Motion, at ¶ 10.

Accordingly, Defendant Levins is not entitled to summary judgment on Plaintiff's claim for negligent supervision.

III. CONCLUSION

For all of the reasons set forth above the instant motion should be denied on the grounds that (1) there is substantial evidence showing that Defendant Moriyama initiated and maintained the charges against Plaintiff in Civil No. 04-1-1317-07 without probable cause, (2) that there is substantial evidence showing that he did so with the requisite malice, (3) that Defendants owed a duty of care to Plaintiff in exercising their statutory authority, and (4) Defendant Levins is subject to liability in his official capacity for the negligence of Defendant Moriyama.

DATED: Honolulu. Hawai'i, FEB 22 2010.

<<signature>>

ERIC A. SEITZ

LAWRENCE I. KAWASAKI

DELLA A. BELATTI

Attorneys for Plaintiff

Footnotes

1 See, Exhibit 1, attached to Defendants' Motion for Summary Judgment.

2 It is noted that Defendant Moriyama learned of Limuel and Hazel Cherry *after* the filing his lawsuit against Plaintiff. See, Declaration of Michael J.S. Moriyama, attached to Defendants Motion for Summary Judgment at ¶17.

3 Defendants herein apparently seek summary judgment on Plaintiff's claim for malicious prosecution based on *initiation* of the charges against Plaintiff. Plaintiff also asserts his claim for malicious prosecution based on Defendant Moriyama's wrongful *maintenance* of the charges against Plaintiff.

4 Defendants Moriyama and Levins are not sued in their official capacity for malicious prosecution, and accordingly the exclusions under the State Tort Liability Act, HRS §662-15(4) are not applicable.

5 See, Exhibit 2 attached to Defendants' Motion.

6 Plaintiff submits that the four individuals or couples identified as witnesses at the time the lawsuit was filed (see Declaration of Michael J.S. Moriyama at ¶17). i.e., "M/M Arruda, Gamache, M/M Paakaula, M/M Pacheco," are included on the list received from the SEB, i.e., Exhibit 2, attached to Motion.

7 See, note 2, *supra.*

8 Defendants' claim for judgment based on the "litigation privilege" is entirely misplaced because this is not a defamation action. See, *Young v. Allstate Ins. Co.*, 119 Haw. 403, at 434 (2008)("Attorneys have an absolute litigation privilege in defamation actions" [...] [t]he litigation privilege does not, however, apply to claims for malicious prosecution.").

9 See, *Medeiros v. Kondo*, 55 Haw. 499 (1974); *Runnels v. Okamoto*, 56 Haw. 1 (1974).

10 Plaintiff submits that the annuities sold to the Cherrys involved investments/initial premiums totaling approximately $700,000. All of them were considered "fixed annuities" which are not considered "securities." Combined they guaranteed the Cherrys, after the first contract year, a combined cash flow/income of $73,368.60 per year until the date of maturity without any penalties. One of them also provided for the doubling of the withdrawal amount in the event of nursing home confinement. The Cherrys also had approximately $1,000,000 in assets outside of the annuities, as well as monthly social security and pension income.

11 The guardianship of Ms. Cherry was subsequently transferred to the Probate Court for further proceedings.

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